ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1145

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLEAN AIR COUNCIL, *et al.*,

Petitioners,

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency 82 Fed. Reg. 25,730 (June 5, 2017)

REPLY OF INTERVENOR-RESPONDENTS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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GLOSSARY

Agency or EPA	United States Environmental Protection Agency
CAA or Act	Clean Air Act
2016 NSPS Rule	"Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,824 (June 3, 2016)

INTRODUCTION

The issue here is clear. Section 307(d)(7)(B) of the Clean Air Act ("CAA" or "Act") unambiguously provides that this Court has no jurisdiction to review a decision by the U.S. Environmental Protection Agency ("EPA") to grant administrative reconsideration. This makes sense because granting reconsideration starts a process that is not final until EPA completes the reconsideration proceeding. Section 307(d)(7)(B)'s jurisdictional limits are consistent with and give effect to longstanding caselaw in this Court and the U.S. Supreme Court that permit review of an agency action only when it constitutes "final agency action."

The Panel's decision to carve an exception from the clear language of Section 307(d)(7)(B) in order to reach the merits of EPA's grant of reconsideration was unfounded. The Panel determined that EPA's stay was a reviewable "final agency action," and then concluded that assessing the validity of the stay authorized review of the merits of EPA's underlying decision to grant reconsideration. In other words, the Panel decided that EPA's decision to grant a stay transformed the grant of reconsideration into reviewable final agency action.

The Panel's decision also is plainly contrary to this Court's and the U.S. Supreme Court's law of finality. For these reasons, we respectfully request the Court to reverse the Panel's decision.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW EPA'S DECISION TO GRANT ADMINISTRATIVE RECONSIDERATION UNTIL EPA TAKES FINAL ACTION IN THE RECONSIDERATION PROCEEDING.

As all parties here agree, a grant of reconsideration—in and of itself—is not reviewable final agency action over which this Court has jurisdiction under CAA § 307(b)(1). Pet'rs' Resp. at 8 (Aug. 2, 2017) (ECF No. 1687021); Slip op. at 6 (July 3, 2017) (ECF No. 1682465) ("an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action"). Section 307(d)(7)(B) states that a denial of a reconsideration petition is reviewable in this Court. 42 U.S.C. § 7607(d)(7)(B). This necessarily means that a decision to grant reconsideration is not reviewable. This makes sense because the grant of reconsideration marks the start of an administrative process that ends only when final action on reconsideration is taken.

This scheme is consistent with D.C. Circuit and Supreme Court law on final agency action under *Bennett v. Spear,* 520 U.S. 154 (1997), and its ample progeny. Agency action is not final unless it "mark[s] the consummation of the agency's decisionmaking process" and it is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 177-78 (internal quotation marks and citation omitted). A grant of reconsideration does not meet either requirement. EPA has not yet decided if it will revise the 2016 New Source

Performance Standard ("NSPS") Rule, 81 Fed. Reg. 35,824 (June 3, 2016), and if so, how. EPA has not yet even issued a proposed rule stating whether EPA proposes to revise or retain the 2016 NSPS Rule. The reconsideration grant merely began a proceeding in which EPA will decide whether or not to revise the rule.

The Supreme Court and the D.C. Circuit have emphasized that their CAA jurisdiction requires final agency action. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) ("Congress … vested the courts of appeals with jurisdiction under § 307(b)(1) to review 'any other final action.'"); *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) ("[W]e reiterate what the Supreme Court made clear thirty-five years ago: Section 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals.'") (quoting *Harrison*, 446 U.S. at 593).[1] Further, no other provision of the CAA provides authority for challenging EPA's decision to open a reconsideration proceeding. The Act

[1] The Petitioners and Petitioner-Intervenors (together "Petitioners") incorrectly assert that CAA § 307 is not jurisdictional. The case they cite regarded section 307's requirement to raise issues during the comment period in order to raise them in court. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602-03 (2014). The Supreme Court decided the comment requirement was a mandatory obligation, not a jurisdictional grant, because that provision "does not speak to a court's authority, but only to a party's procedural obligations." *Id.* at 1602. The provision at issue here—the requirement for final agency action—is within section 307(b)(1), which *does* speak to the D.C. Circuit's jurisdiction. 42 U.S.C. § 7607(b)(1) (stating that a petition for review of "any other nationally applicable regulations promulgated, or final action taken" by EPA under the Act "may be filed only in the United States Court of Appeals for the District of Columbia").

instructs that nothing in the Clean Air Act "shall be construed to authorize judicial review" of EPA orders "except as provided" in section 307. 42 U.S.C. § 7607(e).

The Panel's decision is contrary to Congress's unambiguous instruction in section 307(d)(7)(B) that this Court does not have jurisdiction to review a grant of reconsideration until the reconsideration proceeding is complete. The Panel's decision also is contrary to *Bennett* and D.C. Circuit precedent, justifying en banc reversal of the panel's decision.

The Petitioners and the Panel place great weight on EPA's decision to grant a stay and their assertion that the stay is a final agency action. Clearly, the Panel believed that its ability to review the stay would be defeated if it could not assess the validity of EPA's decision to grant reconsideration. But, even if the stay is reviewable final agency action (which it may not be, as detailed below), that fact cannot transform the decision to grant reconsideration into a reviewable final agency action.

Such a transformation would carve an exception out of Section 307's strict jurisdictional limits that does not and cannot reasonably be construed to exist. Such a transformation also would be irreconcilable with precedent in this Court and the U.S. Supreme Court that prohibits review of non-final agency action.

II. THE PANEL IGNORED RESOLUTIONS THAT RESPECT ITS LIMITED JURISDICTION.

The Panel's error was compounded by the fact that it gave short shrift to plausible alternative views of the law that would have allowed it to avoid the need to expand the Court's jurisdiction beyond statutory and precedential bounds.

The Court can easily conclude that a decision to grant a section 307 stay is committed to agency discretion by law because, absent a merits evaluation of EPA's decision to grant reconsideration (which is beyond the court's jurisdiction), there are no factors in section 307 governing a decision to grant a stay. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (action committed to agency discretion if statute has "no meaningful standard against which to judge the agency's exercise of discretion"). At best, this Court's review of the stay must be constrained to simply verifying that the stay lasts no longer than three months and there is a reconsideration proceeding pending.

Alternatively, the Court did not need to conclude that a decision to grant a stay is necessarily tied to the "mandatory" reconsideration criteria. As EPA explained, "such reconsideration" may be construed to refer to administrative reconsideration proceedings generally, not merely those that are mandatory under section 307(d)(7)(B). EPA Br. Opp'n at 11-13 (June 15, 2017) (ECF No. 1679831). This is an imminently reasonable interpretation of an ambiguous

statutory provision, which would have avoided the perceived need to reach unreviewable non-final agency action.

Lastly, the Court also can reasonably conclude that a decision to grant a stay is not reviewable final agency action because it preserves the status quo. Judge Brown explained in her dissent that the limited three month stay *here* meets neither of the two criteria for final agency action. Slip op. at 2-8 (Brown, J., dissenting). The Petitioners fail to recognize that the stay here is a "neutral, time-limited stay," distinguishing it from other stay authorities. *Id.* at 4 (Brown, J., dissenting) (distinguishing cases cited by the majority with EPA's action here, which is a "neutral, time-limited stay"). The stay is not the end of EPA's decisionmaking process. Merely hitting "pause" does not end the process. If this limited, three-month stay to preserve the status quo is "final agency action," then "every interlocutory action that leaves compliance to the discretion of the regulated party would justify judicial review." *Id.* at 2 (Brown, J., dissenting).

The stay also does not determine rights and obligations but instead preserves the status quo, which Judge Brown described as "forestalling the rule's requirements in order to reconsider them." *Id.* at 6 (Brown, J., dissenting). A time limited stay meant to facilitate EPA's reconsideration process cannot meet the Supreme Court's test for legal consequences. *Id.* at 7 (Brown, J., dissenting). The stay is not a final agency action over which the court has jurisdiction.

Each of these approaches is legally plausible. None would require the court to contradict the plain meaning of section 307 or established D.C. Circuit and Supreme Court case law.

III. PETITIONERS' ARGUMENTS TO THE CONTRARY ARE UNAVAILING.

The Petitioners' arguments in support of the Panel's decision are unavailing. First, the Petitioners assert that, "The Panel correctly determined that although the Court could not review the decision to grant reconsideration absent a stay, that does not render EPA's final action staying the rule unreviewable." Pet'rs' Resp. at 6 (citing Slip op. at 10). That argument proves nothing. Assuming (*arguendo*) that the stay was reviewable final agency action, the fact that the Court has jurisdiction to review the stay does not mean that the Court must have jurisdiction to assess the merits of EPA's non-final grant of reconsideration. The Panel identified what it believed to be a tension in the law—i.e., how to review EPA's stay decision when that decision follows a non-final, non-reviewable agency action. It resolved that tension by reviewing the non-final, non-reviewable action, expanding judicial review jurisdiction contrary to law and precedent.

Petitioners' next claim that Industry Intervenor-Respondents' jurisdictional argument is variously a "red herring" or mere "sleight of hand" because, in their eyes, a decision to grant a stay is plainly reviewable final agency action. Pet'rs' Resp. at 8. The need to carefully police this Court's jurisdiction is no "red herring"

but instead a core duty of Counsel and this Court. Here, section 307(b) and (d)(7)(B) and controlling precedent put an EPA decision to grant reconsideration out of the reach of the court, as the Petitioners themselves agree. The Panel's circumvention of section 307's limits on its jurisdiction must be corrected.

Lastly, Petitioners' cursory dismissal of Industry Intervenor-Respondents "other arguments" (as to how the Panel could have avoided the need to expand its jurisdiction) lacks merit. *Id.* at 14-16. As detailed above, the Panel could have determined that the stay is not final agency action, as Judge Brown argued in her dissent. Alternatively, the Panel could have determined that a decision to grant a section 307(d) stay is committed to Agency discretion by law. Lastly, the Panel could have determined that authority to issue a section 307 stay is not tied to the "mandatory" reconsideration criteria. These alternatives could have, and should have, allowed the Panel to avoid overstepping its clear jurisdictional bounds.

Dated: August 3, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)and 35(b) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing Reply of Intervenor-Respondents in Support of Petition for Rehearing En Banc contains 1,837 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 1,950 words set by this Court's July 31, 2017 Order, ECF No. 1686663. I also certify that this document complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word™ 2010 with 14-point Times New Roman font.

Dated: August 3, 2017

/s/ William L. Wehrum
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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of August 2017, a copy of the foregoing Reply of Intervenor-Respondents in Support of Petition for Rehearing En Banc was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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